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Supreme Court, U.S.
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No. 03-622

IN THE

Supreme Court of the United States

DAVID HENSON MCNAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE REPUBLIC OF HONDURAS THROUGH ITS EMBASSY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Republic of Honduras is represented in the United States by the Embassy of Honduras.[1] The Embassy's duties include safeguarding the rights of Honduran citizens in the United States and ensuring proper interpretation of Honduran law by courts in the United States.

Petitioner McNab is a citizen and resident of Honduras. Petitioner's conviction rests upon judgments about the interpretation and validity of Honduran fishing laws. Honduras appeared as an amicus curiae in the United States Court of Appeals for the Eleventh Circuit. It presented Honduran court decisions, legislative decrees and a declaration from its highest-ranking legal official. All conveyed the official sovereign position regarding the scope and validity of the foreign laws charged in the indictment. Those materials conclusively established that those laws had no force or effect in Honduras at the time of Mr. McNab's conduct. The Eleventh Circuit rejected Honduras' official views in favor of its own erroneous reading of Honduran law.

Honduras applauds the efforts of the United States to enforce international environmental standards, and it supports global initiatives to protect our ecosystem. Indeed, Honduras has continued to strengthen its environmental laws and regulations for this very purpose. In this case, where no violation of environmental law occurred, Honduras' interest is to ensure that the United States applies and enforces Honduran laws in an equitable manner that is consistent with their applicability within Honduras. It also desires to protect its citizens from misapplication of Honduran law. Honduras submits this amicus curiae brief to explain its system of government and laws, as well as the history and interpretation of the legal provisions on which Mr.

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[1] Respondent and petitioner have filed letters consenting to the filing of this brief with the Clerk of Court. Pursuant to Rule 37.6 of this Court, amicus states that no counsel for a party authored this brief in whole or in part, and no person, other than amicus and its counsel, made a monetary contribution to the preparation or submission of this brief.

McNab's conviction is based.[2] As this explanation reveals, Mr. McNab's actions did *not* violate any valid or enforceable law in Honduras.

SUMMARY OF THE ARGUMENT

Mr. McNab's conviction was predicated on a conclusion that he imported lobsters in violation of three "foreign laws": (1) a Honduran administrative rule restricting the size of kept lobsters; (2) a Honduran regulation specifying packaging requirements for lobsters; and (3) a Honduran statute prohibiting, *inter alia*, the harvest and destruction of eggs of aquatic species. The Eleventh Circuit unjustifiably rejected Honduras' official statement that none of the three laws was valid or enforceable against the conduct alleged in the indictment. It upheld the conviction despite evidence that: (1) a Honduran appeals court had annulled the size rule, declaring it void; (2) the Honduras National Congress had effectively repealed the packaging regulation before the lobster shipments in this case occurred; and (3) the egg-harvesting law had been interpreted by Honduras' Attorney General *not* to cover the conduct specified in the indictment, and had also been amended by the Honduran Congress retroactively to eliminate *any* proscription on such conduct.

A panel majority of the Eleventh Circuit substituted its own interpretation of Honduran laws for that of the Honduran government. It based this extraordinary, unilateral approach on what it termed a "posttrial shift in the Honduran government's position regarding the validity of the laws at issue in this case" (Pet. App. 20a (footnote omitted)), and on the asserted need for "finality with representations of foreign law by foreign governments" (*id.* at 23a). But as the

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[2] This brief, and the representations of Honduran law articulated herein, have been reviewed and approved by the Office of the Attorney General of Honduras. The Attorney General, Sergio Zavala Leiva, is authorized by the Republic of Honduras to offer its official legal position, and has provided a declaration to this Court in support of this brief. App. 11a n.1. Because the declaration was finalized and translated shortly before filing, the United States did not receive it until this brief was served.

dissenting judge below correctly noted, the official position of Honduras never changed. *Id.* at 35a-36a. The testimony cited by the Eleventh Circuit as the supposed "original position" of Honduras represented the personal views of bureaucrats who lacked authority to offer opinions on behalf of Honduras. The official position of Honduras—offered first to the trial court in an affidavit of its then-Attorney General, Hector Ramon Tróchez, and later to the court of appeals in a declaration by its current Attorney General, Dr. Sergio Zavala Leiva, and an administrative ruling from its Minister of Agriculture and Livestock—at all times recited a consistent view that the predicate offenses lacked force and effect at the time of Mr. McNab's conduct.

That the personal opinions of individual bureaucrats who offered testimony credited by the district court were ultimately proven wrong in the ordinary course of legislative, administrative and judicial proceedings in Honduras in no way supports the view that Honduras' official position changed after trial. Instead, it demonstrates conclusively that prior to exhaustion of Mr. McNab's direct appeal, the proper mechanisms for obtaining legal rulings and opinions in Honduras regarding the effect of Honduran law produced unanimous, unequivocal judgments from final decision-makers in all three branches of government, each concluding that the conduct charged here did not, in fact, violate any valid, enforceable Honduran law.

The Eleventh Circuit established a separate "finality" rule for convictions based on "foreign law," refusing to recognize any post-trial official clarification of "foreign law" that would contradict a district court's findings. Its explanation for this rule betrays a cynical view that foreign officials are generally susceptible to improper influence by persons "who ha[ve] the means and connections." Pet. App. 24a. Honduras takes great exception to the implication that its laws are for sale to the highest bidder. As there is absolutely no support for the Eleventh Circuit's musings in this regard, this Court should clarify, consistent with the law of other circuits, that a presumption of regularity applies to the acts of foreign governments. If left in place, the Eleventh

Circuit's standard for determining foreign law will undermine the United States' relations with Honduras and other countries, and will deter beneficial trade.

FACTUAL STATEMENT

Petitioner was convicted of conspiracy, smuggling and money laundering based upon shipments of lobster from Honduras to the United States between August 30, 1996, and February 4, 1999. Each count of conviction required proof that he violated the Lacey Act, 16 U.S.C. §§ 3372 *et seq.* The Lacey Act, in turn, requires proof that Mr. McNab imported "fish or wildlife taken, possessed, transported or sold . . . *in violation of any foreign law.*" Pet. App. 93a (emphasis added). The jury's verdict rests upon alleged "foreign law" violations of three independent Honduran legal provisions: (1) keeping undersized lobsters, in violation of Resolution 030-95; (2) using plastic bags, instead of boxes, to transport lobsters in violation of *Acuerdo* 0008-93; and (3) harvesting egg-bearing lobsters, in violation of Decree No. 154. As Honduras demonstrated in the Eleventh Circuit, *all three* legal provisions lacked force or effect in Honduras at the time of the shipments alleged in the indictment. Thus, Mr. McNab did not violate any "foreign law" charged in the indictment.

1. Honduras' System Of Laws And Government

Honduras is a constitutional Republic, with a civil law legal system based principally upon written laws. *See* Pet. App. 10a-11a n.13; App. 11a. The Honduran Constitution is the supreme law of the land. Pet. App. 11a. Beneath the Constitution, there are two forms of Honduran laws at issue in this case: (1) "decrees," which are akin to statutes; and (2) "*reglamentos*," which are akin to regulations of general applicability. In addition, "Resolutions," which are distinct from *reglamentos,* represent administrative decisions that ordinarily resolve a procedure or dispute in which private persons are involved as parties. *See* Pet. App. 10a-11a n.13, 258a, 283a. Sovereign authority to enact, enforce and inter-

pret these laws is shared among the legislative, executive and judicial branches of the Honduran government.

a. The Legislative Branch. The National Congress has the sole authority to create, decree, interpret or revoke statutory "decrees." *See* Pet. App. 258a. When the Congress exercises its power to interpret statutes, such "interpretive laws" state what the law has been from the date the statute was originally enacted. *Id.* at 269a; App. 14a, 22a. In a civil law system, interpretive decrees have effects similar to Supreme Court decisions in common law countries; thus, Honduran courts must accept interpretive decrees "without debate." App. 15a.

When the Congress expressly repeals a statute, regulations promulgated under that statute are thereafter without legal effect, unless the repealing decree expressly states the contrary. Pet. App. 408a-409a (Decree No. 198-2001, interpreting Article 43 of the Civil Code); *see also id.* at 71a (Article 43). Moreover, when a provision of law is repealed or amended in a manner favorable to an accused in a criminal case, the Constitution provides that such change operates retroactively to the benefit of the accused. *Id.* at 415a.

The Congress appoints the Attorney General of the Republic. App. 11a n.1. The Constitution makes the Attorney General responsible for "the Legal representation of the State." Pet. App. 417a (Hond. Const. Art. 228). As legal representative of Honduras, the Attorney General has authority and legitimacy to declare the position of the Republic as to the scope and validity of Honduran laws. *Id.* at 257a, 192a; App. 11a n.1.

b. The Executive Branch. The President is the ultimate representative of the Executive Branch. Pet. App. 261a. He enforces decrees issued by the Congress. *See id.* at 275a (Hond. Const. Art. 245(1)). To that end, the President issues *reglamentos* ("regulations").[3] The Constitution

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[3] A *reglamento* is one type of rule that must be issued in the form of an *acuerdo*. *Id.* at 256a (quoting Article 118 of the General Law of Public Administration); *id.* at 276a (Hond. Const. Art. 245(11)); *id.* at 280a (Hond.

vests the power to issue regulations exclusively in the President absent express delegation to the contrary. Pet. App. 258a (citing Hond. Const. Art. 321); *see also id.* at 296a. As the former Attorney General of Honduras declared in July 2000 (well after Mr. McNab's conduct in this case), the President retained sole authority to issue regulations pursuant to Honduran fishing laws. *Id.* at 255a; *see also id.* at 381a-382a (Decree No. 154, Art. 5).[4]

The Ministry of Agriculture and Livestock is an agency within the Honduran executive branch.[5] The Minister[6] for Agriculture and Livestock is the head of that agency and reports to the President. Pet. App. 261a. The Ministry of Agriculture and Livestock contains several directorates charged with enforcing laws. The General Directorate of Fisheries and Aquaculture (DIGEPESCA) enforces fishing laws, such as Decree No. 154 (the Fisheries Law of 1959). *Id.* at 4a n.2. The General Directorate of the National Agriculture and Livestock Health Service (SENASA) enforces hygiene laws and regulations. *Id.* at 5a n.3.

c. The Judicial Branch. The Honduran Court of First Instance of Administrative Affairs and the Court of Appeals of Administrative Matters resolve disputes related to administrative matters and public law. They act by issuing judgments, including declarations that regulations are invalid. Pet. App. 259a; *id.* at 418a. Parties subject to regulations may bring the equivalent of a declaratory judgment action challenging their validity in those courts, even if no

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Const. Art. 321). An *acuerdo* in translation means "agreement," "decision," or "accord." Pet. App. 258a.

[4] Sometime after July 2000, the President issued an *acuerdo* expressly delegating to the Minister of Agriculture and Livestock authority to promulgate regulations over certain aspects of the fishing laws, such as closed seasons. *See Acuerdo* 1098-01, Article 16.

[5] This Ministry was formerly known as the Department of Natural Resources. This brief uses the names interchangeably.

[6] The Ministers for individual executive branch ministries are also known as "Secretaries of State." Pet. App. 261a.

enforcement action is pending. *Id.* at 288a. Likewise, in enforcement actions, courts may declare that regulations are without legal effect. *Id.* at 418a (Law of the Jurisdiction of Administrative Affairs, Article 30). A court's interpretation of law has no stare decisis effect (App. 13a) and may be superseded by legislative decree, pursuant to the legislature's power to issue binding interpretations of law.

2. Fishing And Hygiene Laws In Honduras

a. The Honduras Fisheries Law of 1959. In 1959 the Congress enacted Decree No. 154, the Honduras Fisheries Law. Pet. App. 379a-400a. Its stated object is the "consevation, propagation, exploitation, marketing and industrializtion of the nation's . . . maritime fauna." *Id.* at 380a. The law enumerates rights and obligations of fishermen, provisions concerning the granting of permits for fishing, rules concerning closed seasons for various species, and rules for private and governmental hatcheries. It empowers "[t]he Executive Branch, through the Secretariat of Natural Resources," to constrain certain activities through regulations. *Id.* at 381a.[7] Article 45 of the Fisheries Law expressly states that "the legal size of the captured species . . . will be the subject of the regulations for this law." *Id.* at 390a.

b. The Law for the Industrialization of Meats. In 1973 Decree No. 40 ("the Meat Law") was enacted, authorizing the issuance of regulations to establish standards for the processing of meat for human consumption. On January 13, 1995, Decree No. 157-94 expressly repealed Decree No. 40 in its entirety. Pet. App. 404a-406a.

3. The "Foreign Law" Bases For Conviction

a. Resolution 030-95 (lobster size). On December 5, 1995, the Minister of the Department of Natural Resources and the General Director of DIGEPESCA issued Resolution

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[7] Both the Attorney General and Honduran courts have interpreted this language to require the President (and not the Minister) to issue the fishing regulations. Pet. App. 255a; 295a-296a; 303a.

030-95. Pet. App. 401a-403a. The Resolution states: "The minimum size to keep a lobster should be 5.5 inches or 14.5 centimeters of abdominal length." *Id.* at 403a.

In an affidavit presented by Mr. McNab to the district court, the incumbent Attorney General of Honduras, Hector Ramon Tróchez, provided an official opinion that Resolution 030-95 was not properly considered a resolution, but rather was a regulation that had not been issued in the proper form of an *acuerdo.* Pet. App. 256a. Mr. Tróchez explained that a "resolution" that purports to exercise general regulatory authority has "absolute invalidity" unless the requirements for a regulation are otherwise met. *Id.* at 255a-256a. Moreover, he stated, the Fisheries Law requires that "measures of captured species" be set only through regulations. *Id.* at 255a. He testified, therefore, that Resolution 030-95 was "invalid," because the officials who issued it had no "authority to dictate acts of general character." *Id.* at 256a. In Honduras, that power resided only in the President. *Id.*

Mr. McNab filed an action to annul Resolution 030-95 in the Court of First Instance of Administrative Law in Honduras.[8] In May 2001, before judgment of conviction was entered in the district court, the Court of First Instance declared Resolution 030-95 invalid. Pet. App. 290a-301a. The court reasoned that Resolution 030-95 was "an administrative act[] of a general nature" (*i.e.*, a regulation). *Id.* at 296a. It held that Resolution 030-95 was not valid, because it had been issued by the Minister and the Director and not the President, who alone had jurisdiction to issue regulations. *Id.* at 295a-297a. Relying upon the power conferred by Article 32 of the Law of the Jurisdiction of Administrative Affairs, *id.* at 297a, the court announced that Resolution 030-95

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[8] Before the foreign law hearing, Mr. McNab sought from the Honduras Supreme Court a declaration that Resolution 030-95 was unconstitutional, which was denied for lack of jurisdiction. Pet. App. 56a-57a. Thereafter, Mr. McNab unsuccessfully sought a trial continuance to enable annulment proceedings to conclude in Honduras' courts. Tr. of Hr'g, Oct. 13, 2000, at 13-17.

was "null and void as a matter of law" and declared it "entirely voided ... for purposes of [its] annulment and future inapplicability," stating by way of explanation that "[t]his Resolution does not confer any right to claims." *Id.* at 298a. In October 2001 the Court of Appeals of Administrative Matters affirmed the judgment of the Court of the First Instance in all respects. *Id.* at 304a. No further appeal ensued, making that decision "final and firm." *Id.* at 322a. The Minister of Agriculture and Livestock accordingly declared that Resolution 030-95 "**never had the force of law**." *Id.* at 322a-323a (emphasis in original).

Before the court of appeals, the current Attorney General, Sergio Zavala Leiva, confirmed that Resolution 030-95 was "null and void *ab initio* and without legal force or effect." Pet. App. 265a; App. 18a, 20a. He stated that the "annulment and future inapplicability" language in the opinion of both administrative courts derived from "the laws of Honduras" (Pet. App. 266a-267a), specifically Article 32 of the Law of Jurisdiction over Action under Administrative Law. App. 18a-20a; *see also* Pet. App. 420a (Article 32). Courts that declare an act "null and void as a matter of law" under Article 32 necessarily determine the act is "deprived ... of its effects as from the moment it occurred." App. 19a. "Future inapplicability," as used in Article 32, refers only to a limit on damage claims that might otherwise be made against the government by persons against whom the invalid law had been applied in the past. Pet. App. 267a; App. 20a. Thus, Dr. Zavala testified, "Resolution 030-95 can no longer be applied in *any* Administrative or Judicial proceeding," and "[n]o individual ... can be sanctioned for failing to comply with [030-95], even when it is shown that the violation occurred before being declared null and void." Pet. App. at 267a. In short, Dr. Zavala testified that the resolution "never ha[s] had legal effect" (*id.*), and "was never the Law of Honduras" (*id.* at 268a).

b. *Acuerdo* 0008-93 (packaging). In January 1993 the President issued *Acuerdo* 0008-93 to enforce the Meat Law. The regulation aimed to protect health by imposing technological, hygienic and sanitary control over fishing products.

Pet. App. 330a. Article 49, governing the "icing and packaging" of "products," including lobster, *id.* at 353a & 331a-332a, stated: "The packaging must be made in boxes with the appropriate label, treated with paraffin." *Id.* at 354a.

Two years later, on January 13, 1995, the Congress expressly repealed the Meat Law *in toto*. Pet. App. 406a. In doing so, it noted that the existing zoosanitary laws required "modernization" and reconciliation with other standards. *Id.* at 405a. It directed the "Executive Power," acting through the Minister of Natural Resources, to "strengthen the phytozoosanitation" by issuing "rules of this Law" within 90 days. *Id.* at 406a. In December 1999, long after that 90-day window expired, the President issued new processing requirements in *Acuerdo* 1081-99. *Id.* at 29a. That same regulation recited that *Acuerdo* 0008-93 was repealed. *Id.*

Such express repeal of *Acuerdo* 0008-93 was unnecessary. The Congress has decreed that express repeal of a statute "leaves without legal effect" any regulations referring to the repealed law. Pet. App. 408a-409a (Decree No. 198-2001). The Attorney General opined that express repeal of the Meat Law in effect "repeal[ed] all of those regulations promulgated under this Decree, including *Acuerdo* 0008-93,"[9] and that "*Acuerdo* 0008-93 had no legal validity or force during the relevant period of time in this case." *Id.* at 269a; *see also* App. 21a. The Director General of SENASA, charged with enforcement of hygiene laws, agreed.[10]

c. Article 70(3) of Decree No. 154 (egg-bearing lobsters). Article 70(3) of the Fisheries Law authorized penalties for

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[9] The Attorney General explained that this "longstanding principle of law" was in effect before the Meat Law was repealed, and was "reiterated" by the Congress in interpretive Decree No. 198-2001, which explained what Article 43 of the Civil Code has always meant. Pet. App. 269a; App. 21a-22a & n.11 (discussing General Principles of Law).

[10] The Director General confirmed that *Acuerdo* 0008-093 was *not* enforced after January 13, 1995, in view of the Meat Law's repeal, and that the President mentioned 0008-93 in *Acuerdo* 1081-99, without having considered the effect of the Meat Law's repeal. App. 1a-2a, 5a.

13 different activities, including "destroy[ing] or harvest[ing] the eggs, or the offspring of fish, chelonians or other aquatic species for profit." Pet. App. 395a. According to the General Director of DIGEPESCA, Article 70(3) "only forbade the destruction or collection for profit of the spawn/eggs or young of fishes, chelonians or other aquatic species," (App. 8a)—*not*, as the indictment in this case alleged, "keeping" or "killing" the egg-laying species. Pet. App. 117a (¶10), 119a (¶15), 135a (¶94). The Attorney General has affirmed the Director's interpretation, reasoning that a broader prohibition of the harvest of egg-laying species would effectively penalize all fishing (in light of the many marine species for which pregnancy is not outwardly apparent), an absurdity that would be economically disastrous (*id.* at 270a; App. 22a). He has also opined that the "for profit" element in Article 70(3) requires the profits be derived from sale of eggs, not fish. App. 22a.

After Mr. McNab's trial concluded, the Congress amended Article 70(3). Pet. App. 411a. The amendment, *inter alia*, replaced the prior list of 13 proscribed activities with a list of 10 specific activities plus a catchall provision for "analogous" activities. *Id.* at 411a-412a. The amended list contains no prohibition whatsoever respecting the harvest or destruction of eggs of aquatic species, or any other analogous provision.[11]

4. Additional Diplomatic Attempts To Present Honduras' Official Position To The United States

On January 23, 2002, before the Eleventh Circuit's decision, the Honduran Embassy in the United States sent the U.S. State Department a diplomatic note. That note attached documents certifying the official position of the Minister of Agriculture and Livestock—that Mr. McNab had

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[11] Article 96 of the Honduran Constitution (Pet. App. 415a) guarantees retroactive effect in criminal matters of any change in law favoring the accused. The Attorney General has opined that the amendment of Article 70(3) has retroactive effect in the criminal proceedings brought against Mr. McNab in the United States. *Id.* at 270a.

violated none of the three foreign laws at issue. Pet. App. 326a. The Embassy further requested that the documents be "submitted as soon as possible to the Department of Justice for its consideration." *Id.*

ARGUMENT

I. THE COURT OF APPEALS SUBSTITUTED ITS OWN ERRONEOUS READING OF HONDURAN LAWS IN PLACE OF HONDURAS' OFFICIAL INTERPRETATIONS

The Eleventh Circuit attempted to answer four questions of Honduran law: (1) whether the Honduran courts' judgment that Resolution 030-95 was invalid applied to conduct preceding the judgment; (2) whether *Acuerdo* 0008-93 lacked effect as of the date the Meat Law was repealed; (3) whether Article 70(3) prohibited capture of egg-bearing species; and (4) whether amendment of Article 70(3) operated retroactively. The court's resolution of each question contradicts the official views of Honduras articulated by authorized institutions and representatives. In each case, the court incorrectly and improperly substituted its own interpretation of text provided in translation, affording the official views of Honduras no deference or weight.

First, the Eleventh Circuit held that Resolution 030-95's size restrictions were valid at the time of Mr. McNab's conduct, and that the Honduran court's opinion declaring 030-95 invalid applied only prospectively. Pet. App. 27a. It based that conclusion on an interpretation of the Honduran court's declaration that Resolution 030-95 was "entirely voided ... for purposes of annulment and future inapplicability: This Resolution does not confer any right to claims." *Id.* at 25a. The Eleventh Circuit pronounced this reference to "future inapplicability" a "clear[] state[ment] that Resolution 030-95 was annulled for prospective application only." *Id.* at 27a. But, as noted above, the Attorney General of Honduras had definitively advised the court of appeals to the contrary. *Id.* at 266a-268a. Moreover, this interpretation ignores the

separate language of the Honduran court's opinion, which states that the resolution was "entirely voided . . . for purposes of annulment" and "absolutely null and void."[12] It also disregards the statutory basis for the Honduran court's jurisdiction in Article 32, which provides that any act declared null and void "be treated as if it had never been carried out," (App. 19a), as well as Article 1596 of the Civil Code, which states that a declaration of "absolute nullity" restores parties to their position prior to the null and void act (*id.* at 19a n.9). The Eleventh Circuit also ignored the textual link between the phrase "future inapplicability" and "right to claims." The Attorney General's explanation—that in light of Article 32 the "future inapplicability" language functions to protect the Honduran government from damages claims based upon past enforcement—is the *only* one that gives meaning to each and every word in the Honduran court's opinion.

Second, the Eleventh Circuit erroneously held that *Acuerdo* 0008-93 continued to have force and effect after the Meat Law was repealed. It interpreted Articles 43 and 44 of the Honduran Civil Code to mean that a regulation survives repeal of its organic statute, so long as the preexisting regulation is not inconsistent with any portion of the repealing legislation itself. Pet. App. 31a. That reading, however, directly contradicts the Congress' interpretation of Article 43, and the Attorney's General's testimony that the Congress merely formalized a longstanding principle of law in its interpretation of Article 43.[13]

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[12] The Attorney General testified that "annulment" and "null and void," as used by the Court of First Instance, meant "void ab initio" and "officially nonexistent for *any* persons who could have been affected by it." Pet. App. 266a (emphasis added). A declaration that an act is "absolutely null and void" or "null and void as a matter of law" "gives the parties the right to be restored to the same Condition in which they were had the null and void act . . . not existed." App. 19a n.9.

[13] The Eleventh Circuit also implicitly rejected Dr. Zavala's unopposed testimony that Decree No. 198-2001, as an interpretive decree, was

The court of appeals cited statements from mid-level Honduran government employees like Secretary General Liliana Paz that *Acuerdo* 0008-93 was "valid" or continued to be enforced after the repeal of Decree No. 40 (Pet. App. 30a n.33),[14] notwithstanding the official and authoritative representation of Honduras that such officials had no authority to interpret any principle of Honduran law on its behalf. The court of appeals believed that the President's "repeal" of *Acuerdo* 0008-93 in 1999 could not be explained if the legislature had indeed previously repealed it in 1995. But the court ignored the testimony of the Director General of SENASA, who explained that the 1999 repeal was superfluous. Finally, the court below advanced a policy rationale that the Congress could not have intended its country to be without hygiene regulations from 1995 to 1999. But that justification disregarded Congress' 1995 statutory mandate that new rules be promulgated within 90 days of repeal of the Meat Law. The Eleventh Circuit elevated its own understanding of Honduras' Civil Code and policy judgments over the express decree of the Congress.

Third, the court of appeals affirmed the district court's finding that Article 70(3) prohibited the capture of egg-bearing species, and held that an amendment to 70(3) that post-dated Mr. McNab's conduct did not render the egg prohibition unenforceable against him. Both conclusions were erroneous. As to the scope of the egg provision, the court deemed that the "plain language" made capture of egg-bearing lobsters illegal, without even citing the testimony of the DIGEPESCA General Director and Attorney General to the contrary. Pet. App. 32a. And it inexplicably rejected the unequivocal declaration of the Attorney General that the

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effective as of the date of the decree it interpreted—a date before the lobster shipments in this case.

[14] These statements were unaccompanied by evidence that Honduras had taken *any* adverse enforcement action under *Acuerdo* 0008-93 after the Meat Law's repeal. Indeed, the General Director of SENASA testified that 0008-93 *was not* enforced after 1995. App. 1a, 5a.

Honduran Constitution would render the amendment of Article 70(3) retroactive "in criminal matters" if a violation had in fact occurred, which it had not.

The Eleventh Circuit has now established a unique, and uniquely disrespectful, approach toward review of foreign-law determinations that gives no consideration to civil law norms and rules of interpretation applied in the foreign country. It provided *no* deference to the special expertise of authorized Honduran officials regarding the interpretation of laws in the original Spanish and the unwritten legal norms in their country. App. 17a-18a. As other courts recognize, Pet. 15-22, deference to such officials is a requisite component of *de novo* review of foreign law determinations, and for good reason. Because legal systems are by nature inherently complex, and because foreign-law judgments must often be based on translations that fail to capture textual nuances recognizable only in the original language, the interpretative guidance of the foreign sovereign itself should be dismissed (if at all) only for the most compelling of reasons.

II. HONDURAS' OFFICIAL POSITION IN THIS LITIGATION HAS BEEN UNIFORM AND UNCHANGING

At several points, the court of appeals implied that it need not afford any special consideration to the official views of the Congress or the Attorney General because such views had "shift[ed]" or "changed" during this case (Pet. App. 20a, 22a, 24a). At other points, it suggested that the official position of Honduras is not uniform, because various "officials" offered "conflicting" views of Honduran law (*id.* at 26a), or had not "reached consensus" (*id.* at 28a). This was error. Both courts below simply misinterpreted Honduran law, and the court of appeals compounded that mistake by accusing Honduras of shifting positions when, in fact, Honduras had merely pointed out the district court's misinterpretation.

Honduras sought leave to participate as an amicus curiae only after the case was appealed, although Mr. McNab presented official Honduran positions to the district court through the testimony of Attorney General Tróchez. The positions articulated in that submissions by Mr. McNab was

in fact consistent with the official position offered by Honduras on appeal. The "original government position" constructed by the Eleventh Circuit consists of statements made by mid-level government bureaucrats who were unauthorized to offer legal opinions on behalf of Honduras and who, in several instances, offered such opinions before any final, official government position had even been formed.

The centerpiece of the lower courts' conclusion that all three laws were valid and enforceable was the "critical" testimony of Liliana Paz, Secretary General in the Ministry of Agriculture and Livestock. Pet. App. 56a. Ms. Paz was the only Honduran government employee who testified live.[15]

As Honduras informed the Eleventh Circuit, Ms. Paz had *no* authority to offer any legal opinions on behalf of the Republic. Regulations issued pursuant to the General Law of the Public Administration describe the position of Secretary General as an "agen[t] of communication" and a "certification official[]." *See* Pet. App. 286a. Ms. Paz's duties include, *inter alia*, to "see that the matters being processed are dispatched by the established deadlines," to "keep a record of the official correspondence," and to "notify . . . concerned parties of the decisions or resolutions." *Id.* Secretaries General, moreover, have no decision-making authority beyond the authority properly delegated to them *through a Delegation Acuerdo* by the head of the respective agency. *See* Pet. App. 263a. As explained by the Attorney General, a Secretary General "does not issue legal opinions *at any time* . . . . This would violate the Honduran legal structure."

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[15] The courts below repeatedly cited Ms. Paz's testimony to support their conclusions that each foreign law was valid (Pet. App. 54a, 62a, 63a, 64a, 30a n.33); that the annulment of Resolution 030-95 by the administrative courts applied only prospectively (*id.* at 27a n.29); that Honduras continued to enforce *Acuerdo* 0008-93 after 1995 (*id.* at 72a-73a, 30a n.33); and that the prohibition on harvest or destruction of eggs survived the amendment to Article 70(3) (*id.* at 76a & 33a (referring to "government's evidence" at Pet. App. 28a n. 32)).

Id.[16] Ms. Paz's testimony merely expressed her personal opinion and was not Honduras' official position.[17]

The Honduran Constitution provides: "The servants of the State only have those powers expressly conferred upon them by the law. Any act performed by them outside the Law is null and void . . . ." Pet. App. 280a. That is why, when Mr. McNab lodged a complaint with the National Human Rights Commissioner regarding Ms. Paz's testimony, the Commissioner recommended that the Minister of Agriculture and Livestock "disqualify as an error of law" her testimony. *Id.* at 313a. The Minister did so on November 15, 2001, certifying the "official" position of the Minister (*id.* at 316a): that Resolution 030-95 never had the force of law (*id.* at 317a); that *Acuerdo* 0008-93 was repealed in 1995 (*id.*); and that the amendment to Section 70(3) eliminating the egg provision retroactively removed any prohibition on the har-

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[16] Although the Eleventh Circuit characterized Ms. Paz as the "highest ranking legal official" in the Ministry of Agriculture and Livestock (Pet. App. 7a), such conclusion is entirely unsupported by evidence. It quoted a brief of the United States, whose record citations in turn quoted argument by the prosecutor. Those statements wildly exaggerate Ms. Paz's testimony, who characterized the extent of her "legal duties" as "helping the Minister in matters having to do with legal affairs." *Id.* at 160a. The Minister's affidavit quoted by the Eleventh Circuit as the source of her authority (*id.* at 22a n.25) does not constitute a Delegation *Acuerdo* such as would be necessary to permit her to offer legal opinions on behalf of Honduras.

[17] The Eleventh Circuit also relied, in part, on statements from Jose Bernardo Torres Umanzor, a legal advisor in the Ministry of Agriculture and Livestock, and Juan Hernandez Espinoza, a criminal prosecutor. But as with Ms. Paz, neither occupied a position that authorized him to provide official legal opinions on behalf of Honduras. Indeed, prosecutor Hernandez went so far afield as to offer legal opinions about matters completely outside his job function—*i.e.*, the meaning and effect of a ruling issued by an administrative court. Pet. App. 264a n.10. Likewise, Mr. Torres lacked authority to provide legal opinions outside the Ministry of Agriculture and Livestock. *Id.* at 263a (opinions from advisory organs are "solely for internal use"). In any event, his opinion was superseded by his supervisor, the Minister, whose final, definitive views contradicted his statement. *See* Pet. App. 315a-318a; App. 1a-2a, 5a.

vest or destruction of eggs. *Id.* at 318a. This administrative act by the Minister represents the official position of Honduras, and established the agency's legal position to be applied in all cases henceforth. App. 11a-12a & 15a-16a.

To the extent that any "inconsistency" was produced by the refinement of the government's position during the pendency of non-final legislative, judicial and administrative proceedings, such "inconsistency" was no different than what occurs in the course of the evolution of United States law. It is not unusual in this country for government employees charged with implementing a law to support the validity of a statute or regulation or to opine on the meaning or scope of a judicial ruling—only to be told later by a court of last resort or a higher-ranking legal authority that such law is invalid or such interpretation is wrong. When clarification of United States law benefits a convicted defendant whose direct appeal is not yet final, it must be applied in his favor. *See* Pet. 28-29. It is axiomatic that a Lacey Act conviction based on a state law validated by an intermediate state court decision would be vacated if that state's Supreme Court overruled the lower court's decision, even after the Lacey Act trial.

On direct appeal from conviction of the parallel Lacey Act provision that prohibits importation "in violation of any law . . . of any State," 16 U.S.C. § 3372(a)(2)(A), this Court has examined the underlying validity of a predicate offense. In *Maine* v. *Taylor*, 477 U.S. 131, 133 (1986), the defendant pleaded guilty to importing fish in violation of a Maine law. After the First Circuit overturned his conviction on the ground that the Maine law unconstitutionally burdened interstate commerce, this Court granted certiorari and reiterated that the Lacey Act provides for "federal enforcement of *valid* state and foreign wildlife laws." *Id.* at 139 (emphasis added). The Court ultimately found the state law constitutional (*id.* at 151), crediting the "legitimate justifications" for the law offered by Maine, which intervened to support its validity. *Id.* at 149. It criticized the First Circuit for suggesting that the State's justifications were "*post hoc* rationalization[s]." *Id.* The case presented here is no different—

the validity of the predicate offense should be examined in view of the official position of the government that promulgated the laws.

By applying a principle of "finality" that terminates a court's ability to recognize natural development of foreign law after a jury verdict (Pet. App. 22a-23a), the Eleventh Circuit interpreted the Lacey Act in a manner that treats defendants accused of domestic predicate offenses more favorably than those accused of foreign offenses. The Lacey Act—enacted to help *strengthen* a foreign country's laws[18]—ought not be used, as here, to subvert the evolution of a foreign sovereign's regulatory law.

III. THE STANDARD OF REVIEW ANNOUNCED BELOW VIOLATES PRINCIPLES OF COMITY AND IMPAIRS THE UNITED STATES' RELATIONSHIP WITH HONDURAS

Honduras asks that its legal system be treated with the respect that United States courts afford the legal systems of other sovereign nations, including, for example, Indonesia, Mexico, Brazil, China, France, Tonga and Cuba.[19] The Eleventh Circuit majority barely disguised its contempt for the system of laws in foreign countries when it stated that recognition of developments in a government's laws will enable wealthy criminals successfully to "lobby[] and prevail[] upon [the] country's officials." Pet. App. 24a. Such concerns find

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[18] *See* S. Rep. No. 97-123, at 4 (1981), *reprinted in* 1981 U.S.S.C.A.N. 1748, 1749 ("[The Lacey Act] would not constitute a broadening of Federal authority under the Act, but merely would allow the Federal Government to provide more adequate support for the full range of State, foreign and Federal laws that protect wildlife.").

[19] *See Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003); *Access Telecom, Inc.* v. *MCI Telecom. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999); *Riggs Nat'l Corp.* v. *Comm'r*, 163 F.3d 1363 (D.C. Cir. 1999); *Richmark Corp.* v. *Timber Fallling Consultants*, 959 F.2d 1468 (9th Cir. 1992); *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (*per curiam*); *Kaho* v. *Ilchert*, 765 F.2d 877 (9th Cir. 1985); *United States* v. *Pillsbury Flour Mills Co.*, 96 F.2d 854, 859-860 (C.C.P.A. 1938).

no basis in the record of this case. And they cannot justify a standard of review that severely undermines principles of comity and deference typically applied when American courts tread into unfamiliar waters of foreign law.

Moreover, the Eleventh Circuit's standard for considering (or not considering) the official views of foreign governments in the Lacey Act context, if left uncorrected, will dramatically harm the trading relationship between Honduras and the United States, especially in the marine fisheries industry that is so critical to Honduras' economy. If Honduras' complex administrative code is open to reinterpretation by United States prosecutors and courts, Honduran citizens importing goods to this country can no longer be secure in statements by Honduran courts or the Honduran Congress that they have complied with ambiguous Honduran laws and regulations. That a Honduran citizen has been convicted and sentenced to eight years in prison for conduct that was not properly deemed even an administrative violation, much less a crime, in Honduras can only result in distrust that will produce less cooperation and less trade overall.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
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DECEMBER 2003

APPENDIX

APPENDIX

SAG SECRETARIAT OF AGRICULTURE AND LIVESTOCK

By producing more, we will preserve peace

NATIONAL AGRICULTURAL AND LIVESTOCK HEALTH SERVICE (**SENASA**)

STATEMENT FOR THE RECORD

The Undersigned Director General of the National Agricultural and Livestock Health Service (SENASA) hereby STATES FOR THE RECORD:

1. That the Draft Regulations for the Animal Health Inspection and Certification Regulations of Fisheries and Aquatic Products in Decision ["Acuerdo"] 1081-99 was formulated by **Secretary of State in the Offices of Agriculture and Livestock through this General Directorate of the National Agricultural and Livestock Health Service (SENASA)** pursuant to Article 36, Number 5, of the General Public Administration Law, which sets forth that it is an attribution and power of the Secretary of State to formulate, with regard to matters over which he has jurisdiction, the Draft Regulations of the President of the Republic.

2. Decision ["Acuerdo"] 0008-93, issued pursuant to the Meat Industrialization Law (Executive Decree No. 40 of May 16, 1973), was repealed and rendered without any legal value or effects as of January 13, 1995, when the Plant and Animal Health Law (Decree 157-94) went into effect, which repeals in Article 42 thereof the Meat Industrialization Law.

The repeal of Decision ["Acuerdo"] 0008-93, which appears in Article 124 of Decision ["Acuerdo"] No. 1081-99

was not necessary, inasmuch as it had already been repealed since 1995.

3. The foregoing occurred, due to the fact that, when the Draft Regulations in question were drawn up, the fact that the Meat Industrialization Law had been expressly repealed previously was not considered.

In witness whereof, for the record, I sign these presents in the city of Tegucigalpa, M.D.C., on the eleventh day of the month of January of the year two thousand two.

[illegible signature]

DR. FRANCISCO RODAS CH.

Director General of SENASA

[Rubber stamp w/coat-of-arms in the center reading: "SECRETARIAT OF STATE IN THE OFFICE OF AGRICULTURE AND LIVESTOCK, GENERAL DIRECTORATE OF SENASA, TEGUCIGALPA, M.D.C., HONDURAS".]

cc: File

Main Offices: Boulevard Miraflores, Avenida de la FAO,
Tegucigalpa, M.D.C., Honduras, C.A.
Telephones: 232-9089,232-7747 - Fax: 231-0786,
Post Office No. 309

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as uch by the U.S. Federal Court System, and that I have translated the attached document from Spanish into English on January 15, 2002, to the best of my ability.

Signed: /s/ Paul R. Sadur
Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

WITNESS my hand and official seal, the 15th day of January, A.D. 2002.

/s/ Frances R. Everidge
Notary Public
State of Florida at Large

_ Personally known by me.
X Produced the following identification:
FL Drivers License

Frances R. Everidge
Notary Public, State of Florida
My. comm. expires Dec. 26, 2003.
Comm. No. CC 897604

SAG SECRETARIAT OF AGRICULTURE AND LIVESTOCK

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NATIONAL AGRICULTURAL AND LIVESTOCK HEALTH SERVICE (**SENASA**)

STATEMENT FOR THE RECORD

The Undersigned Director General of the National Agricultural and Livestock Health Service (SENASA) hereby **STATES FOR THE RECORD**:

1. That the National Agricultural and Livestock Health Service (SENASA) was created as a General Directorate, just as stipulated in Article 3 of the Plant and Animal Health Law, Decree No. 157-94. The Secretariat of Agriculture and Livestock through SENASA shall be responsible for enforcing compliance with the provisions of the Plant and Animal (Health] Law and its Regulations relative to Animal and Plant Health.

2. That the Industrial Inspection and Health and Hygiene Regulations of Fisheries Products (Decision ["Acuerdo"] 0008-93) was not enforced by SF-NASA after January 13, 1995, in view of the fact that the Meat Industrialization Law, on which said Decision is based, was repealed on that day by the Plant and Animal Health Law.

In witness whereof, for the record, I sign these presents in the city of Tegucigalpa, Municipality of the Central District, on the twenty-fifth day of the month of January of the year two thousand two.

[illegible signature]

DR. FRANCISCO RODAS CH.

Director General of SENASA

[Rubber stamp w/coat-of-arms in the center reading: "SECRETARIAT OF STATE IN THE OFFICE OF AGRICULTURE AND LIVESTOCK. GENERAL DIRECTORATE OF SENASA. TEGUCIGALPA, M.D.C., HONDURAS".]

cc: File

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Signed: /s/ Paul R. Sadur
Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

[SAG letterhead]
SECRETARIA DE AGRICULTURA Y GANADERIA
DIRECCIÓN GENERAL DE PESCA Y ACUICULTURA

DECLARACIÓN

LA DIRECCIÓN GENERAL DE PESCA Y ACUICULTURA. Tegucigalpa, Municipio del Distrito Central, cuatro de marzo del dos mil dos.- En cumplimiento del auto emitido por la Secretaria General de la Secretaria de Estado en los Despachos de Agricultura y Ganaderia, relacionado con la solicitud de Declaración, presentada por la Licenciada **MARIA LETIZIA SUAZO DE GUILLEN** en su condición de apoderada legal del señior **DAVID HENSON MCNAB**; esta Dirección General de Pesca responde de la forma siguiente:

1.- En relación a la interrogante numero (1) Es la Secretaria de Estado en los Despachos de Agricultura y Ganaderia a través de la DIRECCION GENERAL DE PESCA Y ACUICULTURA (DIGEPESCA) la autoridad encargada de la aplicación de las Leyes Pesqueras Hondureñas.

2.- En relación a la interrogante numero (2) El articulo 70 numeral 3 de la Ley de Pesca contenido en el Decreto No 154 de fecha 9 de junio de 1959; **SOLAMENTE PROHIBÍA LA DESTRUCCIÓN O RECOLECCIÓN CON FINES DE LUCRO DE LOS HUEVOS 0 DE LAS CRIAS DE LOS PECES, QUELONIOS U OTRAS ESPECIES ACUATICAS, no asi LA DESTRUCCIÓN O RECOLECCIÓN DE LAS ESPECIES OVADAS.**

3.- En relación a la interrogante numero (3), Efectivamente El articulo 70 numeral 3 do la Ley de Pesca contenido en el Decreto No 154 de fecha 9 de junio de 1959, este dejo de aplicarse una vez que entro en vigencia las reformas del articulo 70 mediante Decreto 245 -2000 del veintidós de diciembre del dos mil y publicado el cinco febrero del dos mil uno.

/s/
GABRIELA PINEDA DE ARIAS
DIRECTORA GENERAL

[New Page]

SAG SECRETARIAT OF AGRICULTURE AND LIVESTOCK **DIGESPESCA**
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GENERAL DIRECTORATE OF FISHERIES AND AQUACULTURE

STATEMENT

THE GENERAL DIRECTORATE OF FISHERIES AND AQUACULTURE, Tegucigalpa, Municipality of the Central District, fourth day of the month of March of the year two thousand two.

Pursuant to the decision issued by the Secretary General of the Secretariat of State in the Offices of Agriculture and Livestock, related to the request for a Statement, submitted by **MARÍA LETIZIA SUAZO DE GUILLÉN**, Esq., as legal representative of Mr. **DAVID HENSON McNAB**; this General Fisheries Directorate responds as follows:

1. With regard to question number (1), the Secretariat of State in the Offices of Agriculture and Livestock through the GENERAL DIRECTORATE OF FISHERIES AND AQUACULTURE (DIGEPESCA), is the authority responsible for the enforcement of Honduran Fisheries Laws.

2. With regard to question number (2), Article 70, Item 3, of the Fisheries Law contained in Decree No. 154, dated June 9, 1959, **ONLY FORBADE THE DESTRUCTION OR COLLECTION FOR PROFIT OF**

THE SPAWN/EGGS OR YOUNG OF FISHES, CHELONIANS OR OTHER AQUATIC SPECIES, BUT NOT THE DESTRUCTION OR COLLECTION OF THE EGG-LAYING SPECIES.

3. With regard to question number (3), indeed Article 70, Item 3, of the Fisheries Law contained in Decree No. 154 dated June 9, 1959, ceased to be enforced once the amendments of Article 70 went into effect by means of Decree 245-2000 of the twenty-second of December of the year two thousand, as published on the fifth day of February of the year two thousand one.

[Seal: "SECRETARIAT OF AGRICULTURE AND LIVESTOCK. GENERAL DIRECTORATE OF FISHERIES AND LIVESTOCK. DIGEPESCA. HONDURAS. CENTRAL AMERICA".]

[illegible signature]

GABRIELA PINEDA DE ARIAS

GENERAL DIRECTOR

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TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached document from Spanish into English on March 5, 2002, to the best of my ability.

Signed: /s/ Paul R. Sadur
Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

Subscribed and sworn to before me,
/s/ Susan L. Kingston
Susan L. Kingston
Commission # DD086863
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SUPPLEMENTARY STATEMENT OF SERGIO ZAVALA LEIVA, ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS

I am the Attorney General of the Republic of Honduras and as such, its legal representative[1] by virtue of Article 228 of the Constitution of the Republic. In that capacity, I appear before this Honorable Supreme Court of Justice to supplement the statement that I submitted in this case to the U.S. Court of Appeals for the Eleventh Circuit.

We understand that the U.S. Courts have had difficulty in determining the law of Honduras applicable to this case. Our legal system is different from the U.S. system in that it is based on written laws, while the U.S. system is based on judicial decisions, and, hence, our system is unknown and very different.

In the interest of Justice, I must now complement my previous statement to help this Court correctly interpret and apply the laws of our country.

I. The State of Honduras has at no time changed its official position regarding its laws.

A) As we already mentioned, the Constitution of the Republic stipulates that the State's Legal Representative is the Attorney General of the Republic, and as such, he is authorized to declare the position of the State. In our legal system, there are also so-called "Acts of the Administration's agencies" or Administrative Acts that, according to legal doctrine,

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[1] I was appointed Attorney General of the Republic of Honduras through Decree No. 3-2002, issued by the National Congress on January 26, 2002. I have the authority to issue statements of an illustrative or doctrinal nature in which the State of Honduras informs its official position under the Law of the Office of the Attorney General of the Republic.

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ATTORNEY GENERAL
Honduras, CENTRAL AMERICA

are considered to be legal acts of the administrative function that constitute the intention, judgment, knowledge or desire of the agency that issues them, and as such, legal effects are derived from them.

B) The Law says that: "acts of agencies of the public Administration will be in the form of Decrees, Decisions, Resolutions or Orders" (Article 116 of the General Law of the Public Administration), and the following are null and void "a) Those issued by agencies having absolutely no jurisdiction;... [and] c) Those issued by dispensing totally and absolutely with the established procedure" (Article 34 of the Law of Administrative Procedure). Consequently, any act created in violation of those legal regulations has neither value nor legal effect[2].

C) The Eleventh Circuit based its interpretation of Honduran laws on the testimony of officials that provided cooperation that was neither official nor binding to the U.S. officials.

D) Honduras has been involved in this case solely through its Minister of Agriculture and Livestock through a Resolution of November 15, 2001, as well as through this Office of the Attorney General of the Republic and the Embassy of Honduras in the United States, acting as *Amicus Curiae* before the Eleventh Circuit. The Government of Honduras has not changed its official position, but, instead, refers to the legal aspects contained in this document.

II. Interpretation of the Law in the Honduran legal system.

A) In Honduras, there are three types of interpretations of the laws:

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[2] For more details, see the Statement presented before the Eleventh Circuit.

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Honduras, CENTRAL AMERICA

1. **Authentic interpretation:** This interpretation emanates from the lawmaker when he explains the meaning of his own laws.
2. **Judicial interpretation:** This interpretation is imposed by the courts of justice when applying laws in specific cases.
3. **Doctrinal interpretation:** This interpretation is the one that jurists or experts in jurisprudence make when giving their personal opinions, and it receives its strength from the experience and wisdom of its authors.

B) In our legal system, the judicial interpretation is applicable only to a case in which the judgment is handed down and does not have general effects like judicial precedent ("stare decisis"), as is the case in the U.S. system of jurisprudence. For such reason and as an answer to the need for a general interpretation of the Law, our legislation contemplates that "the lawmaker is called upon only to explain or interpret the law in a way generally compulsory (Article 3 of the Civil Code)[3].

C) When the National Congress interprets a law, it is not amending it. To amend is another of the powers of the National Congress. The Constitution of the Republic stipulates in its Article 205, paragraph No. 1, that the National Congress has the power "to create, decree, ***interpret***, ***amend*** and repeal laws" (the emphasis is added). When using different terms for "interpret" and "amend" the laws, the National Constituent Assembly made the conscious decision to differentiate between the two terms. Therefore, the term "interpret" does not include "amend," and an interpretation of the law is not an amendment.

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[3] This precept is not unique to Honduran legislation, but, instead, it is similar in almost all civil legal systems based on Roman law and has its origin in the Justinian Code that includes the principle that "the law must be interpreted by the one who makes it."

D) In the vernacular, the word "interpret" means "to explain or state the meaning of a thing, mainly texts that lack clarity" (Dictionary of the Spanish Language, Spanish Royal Academy [Diccionario de la Lengua Española, Real Academia Española], Twentieth Edition). The Dictionary of Customary Law [Diccionario de Derecho Usual] defines the word "interpretation" as the "statement, explanation or clarification of the meaning of a thing or of an incomplete, nebulous or questionable text", and it defines explicitly the phrase "authentic interpretation" as "the clarification that the lawmaker himself makes of a law issued by it" (Dictionary of Customary Law [Diccionario de Derecho Usual], Guillermo Cabanellas, Sixth Edition). The word "interpretation" in no way includes *the change* of the meaning of what is interpreted.

E) If, when interpreting a law, the National Congress is only explaining the meaning thereof, logically, such explanation does not give rise to any problem of retroactivity, because the explanation gives the sense that the Law has always had. Consequently, such interpretation requires that it be incorporated at the time the interpreted law is applied in any pending case.

F) It is important to differentiate between a doctrinal interpretation and the lawmaker's authentic interpretation. The former is the opinion of jurists who can illustrate regarding a specific aspect of the law, what we call "experts", just as several persons for both parties have appeared, both private individuals as well as government employees. The lawmaker's authentic interpretation is the Law itself, an, therefore, it cannot be impugned. In this latter case, the courts of justice must not debate whether they are convinced with the

interpretation. They must simply accept it without debate[4].

G) In our legal system, the lawmaker's authentic interpretation has effects that are similar to those that the interpretation of a law by the Supreme Court has in the United States. Both are the maximum authority to interpret the laws in our countries.

H) If any person feels he is harmed by an interpretative Law and feels that the National Congress has acted incorrectly in making such interpretation, he can file an Appeal of Unconstitutionality before the Supreme Court of Justice.

III. Resolutions issued by a Minister are administrative acts that are similar to judicial rulings and have similar legal effects.

A) "The Resolution will put an end to the procedure, and all matters put forth by interested parties will be decided in its operative part, ..." (Article 83 of the Law of Administrative Procedure). The Resolution is the act through which the Administration states its position with respect to matters requested by interested parties when a procedure begins through a formal petition. It is therefore the act through which the State declares its intention or decision with respect to a given situation posed by an interested party.

B) The Resolution of the Minister of Agriculture and Livestock issued on November 15, 2001, concluding the administrative procedure begun by the National Human Rights Commissioner, has legal efficacy under the laws of Honduras, establishes the decision of the State with respect to the matter raised by the Commissioner in his

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[4] The only case in which a Court of Justice can fail to incorporate a legislative interpretation to the interpreted law is one in which there is a determination of unconstitutionality declared by the Supreme Court of Justice.

report and establishes the correct standard of conduct within the Ministry of Agriculture and Livestock. According to Article 8 of the General Law of Public Administration, agencies of the Public Administration may not violate the provisions issued by a higher-level agency, which must therefore be obeyed by all the officials of said Ministry.

C) In spite of the fact that it is an official act of the Government of Honduras and is equivalent to a court judgment, this administrative resolution has been completely ignored by the Court of Appeals.

D) It is important to emphasize the difference between the Resolution of the Minister of Agriculture and Livestock of November 15, 2001, concluding the procedure begun by the National Human Rights Commissioner, and Resolution 030-95, which serves as a basis for the accusation. The Resolution of November 15 is the act through which the administration formally decides the matters presented in a petition after following the procedure required by Law. On the other hand, Resolution 030-95 establishes measures of a regulatory nature that are vested in the President of the Republic[5]. The courts of Jurisdiction over Action under Administrative Law (Contencioso-Administrativo) treated Resolution 030-95 as a Regulation and declared its nullity based on Article 34 of the Law of Administrative Procedure because it was issued by an agency absolutely lacking jurisdiction[6] and because it dispensed with the required procedure.

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[5] The exception occurs when the law expressly vests this power of regulate in a different agency.

[6] The Constitution of the Republic stipulates that the President of the Republic is the one responsible for issuing regulations of a general nature. For more details, see the First Statement of this Office of the Attorney General presented before the Court of Appeals of the Eleventh Circuit.

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E) If any person that is considered affected feels that the Minister of Agriculture and Livestock has acted incorrectly in issuing its Resolution of November 15, it can resort to the Courts with Jurisdiction over Action under Administrative Law to sue to have the act declared illegal and be annulled. As long as this does not occur, this act of the administration is legitimate and has legal efficacy.

IV. When there are doubts with respect to the interpretation of a specific Law, "the obscure or contradictory passages will be interpreted in such a way as to be most in agreement with the general spirit of the legislation and natural equity" (Article 20 of the Civil Code).

A) In our legal system, there are general principles of law that are commonly known and used. Such principles, derived generally from Roman law, because they are not codified, can be contradictory for another different Legal System.

B) Laws are interpreted using the meaning of the words used by the Lawmaker, the context of the law itself, the general principles of law, the lawmaker's intention and natural equity. It must not be assumed that the lawmaker issues Laws that are absurd or that harm the country's interest.

C) The law can be translated from Spanish to English in different ways that can suggest different meanings. Therefore, it is important that the U.S. Courts must not give a literal interpretation to the terms used in the legal translations of foreign materials and that such courts recognize that foreign Governments (whose laws such courts must interpret) have the expert criterion that allows putting such translations in the foreign legal context and thus giving the translated laws the interpretation most in accordance with the natural

lawmaker's intention and with the internal consistency of the foreign legal system.

V. The disputed Honduran Laws and Regulations in the Case:

A) Resolution 030-95

As mentioned above, Resolution 030-95 was declared Null and Void by Operation of the Law (Nula de Pleno Derecho), *ab initio* or *ex tunc*, by the Administrative Courts for Action under Administrative Law because they were issued in violation of the laws of our country, "infringing the legal system at the time it was issued."

In view of the fact that the impugned resolutions, including Resolution 030-95, were considered final, the direct action of challenge could only be filed on the basis stipulated in Article 32 of the Law of Jurisdiction over Action under Administrative Law. In such sense, when the Courts for Action under Administrative Law declared the nullity of those acts, they necessarily determined that the Resolutions were Null and Void by Operation of the Law or Absolutely Null and Void although they were effective before they were declared null and void by the courts having competent jurisdiction.

To better understand the Absolute Nullity of Resolution 030-95, is important to understand the meaning of ***Nullity by Operation of the Law*** also known as ***Absolute Nullity.***

Nullity by Operation of the Law, or ***Absolute Nullity***, is the maximum degree of invalidity. The cases of Absolute Nullity in administrative law are more restricted than in common law and are limited to those expressly mentioned in administrative laws.[7] Nullity by Operation of the Law has the following features:

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[7] In Honduran administrative legislation, "without detriment to what is established in special laws, " the cases of absolute nullity are listed in Article 34 of the Law of Administrative Procedure (Decree No. 152-87 of September 28, 1987), and, among them, we mention "a) Those issued by

1. **There is no time limit to assert the violation**: Nullity can be claimed at any time, even when the act is final. This is expressly recognized in the Law of Jurisdiction over Action under Administrative Law, in its Article 32 when it "admits the action under Administrative Law against final acts... when they are null and void by operation of the law and are causing their effects."
2. **The defect cannot be cured**: Our administrative legislation establishes a difference between acts that are null and void and acts that can be annulled.[8] The defects of an act that can be annulled can be cured, whether through the simple passage of time or through other means, while defects of an act that is Null and Void by Operation of the Law cannot. For this reason, they must be declared null and void.
3. **The statement of nullity has *ex tunc* or *ab initio* efficacy**: The declaration of Absolute Nullity of an act deprives the act of its effects as from the moment it occurred. This is based on the General Principal of Law that requires that a null and void act be treated as if it had never been carried out.[9]

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agencies having absolutely no jurisdiction" and "c) Those issued by dispensing totally and absolutely with the established procedure."

[8] Articles 34, 35, 36 and 37 of the Law of Administrative Procedure, among others.

[9] The Civil Code of Honduras stipulates that there must be "proper harmony and consistency" among the laws (Art. 19), for which reason Article 1596 of the Code in question strengthens even more the application of this principle when stipulating that "Absolute nullity. . . declared by a final judgment gives the parties the right to be restored to the same Condition in which they were had the null and void act. . . not existed".

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Nullity by Operation of the Law of an administrative act is not automatic. A declaration by the bodies having jurisdiction, which in our country are the Courts for Action under Administrative Law, is necessary for it to be effective. Once the Nullity is declared, its consequences are the same as in common Law.

Having explained the features of ***Nullity by Operation of the Law*** or ***Absolute Nullity***, we analyze the relationship of the former with Article 32 of the Law of Jurisdiction over Action under Administrative Law.

Article 32 stipulates that "action will be admitted . . . against final acts . . . when they are ***null and void by operation of the law*** and are effective" (the emphasis has been added). Because this declaration of Nullity by Operation of the Law is *ab initio* or *ex tunc*, the State would run the risk of being sued for damages resulting from the application of impugned acts before they were declared null and void.

Foreseeing this situation, said Article stipulates that "action under Administrative Law will be admitted ... ***but only for purposes of its annulment and future inapplicability***" (the emphasis has been added), the latter being included for the government's protection.[10] This last part does not qualify or alter the *ab initio* effect of the declaration of nullity, nor does it at any time validate an act that has been declared ***Null and Void by Operation of the Law*** by the judicial authority having jurisdiction. As I said in my statement before the Eleventh Circuit, the purpose of the final part of the Article in question is "to protect [the State] from damages that could be caused by application of an act that is null by operation of the law."

There is no question that, according to the laws of Honduras, Resolution 030-95 was declared Null and Void by Operation of the Law, *ab-initio* or *ex tunc*, by the Courts for Action

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[10] If the declaration of Nullity as a Matter of Law were not *ab initio* or *ex tunc*, the inclusion of this phrase in the related Article 32 would be totally unnecessary.

under Administrative Law. Because it was declared Null and Void, Resolution 030-95 is treated as if it had never existed and it does not continue to be applied in any pending case, including criminal cases like this case.

B) Decision No. 0008-93

Decision 0008-93, promulgated to implement the Law of Industrialization of Meat (Decree Law number 40) has not been legally valid since 1995, when the Law based on which the Decision was issued was repealed.

Historically and Legally, a Regulation ceases to have validity when the Law that authorized it is repealed. This principle is based on the General Principles of Law accepted in Honduras.[11]

Furthermore, through Decree No. 198-2001, the National Congress incorporated this preexisting principle to the legal body of Article 43 of the Civil Code, explaining that "the express repeal ... of a law, renders the regulation issued to develop the repealed Law ... without value or legal effects."

The Office of the Attorney General of the Republic agrees with the great Honduran jurists[12] who issued statements on the matter in this case, saying that another General

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[11] The General Principle of Law in this sense was summarized by the National Human Rights Commissioner, Dr. Leo Valladares, in his Special Report as "the old maxim that the accessory follows the fate of the main thing". This principle has its origin in the precept of Roman Law that says: "*when the main thing does not subsist, the accessory thing cannot subsist.*" The "law" being the main thing and the "regulation" being the accessory, the regulation follows the fate of the law, i.e., when the law is repealed, so, too, is the regulation repealed.

[12] Attorney José Oswaldo Ramos Soto, former Chief Justice of the Supreme Court of Justice and former Dean and Constitutional Professor of Law of the School of Law of the National Autonomous University of Honduras, Attorney Nicolás Cruz Torres, former Magistrate of the Supreme Court of Justice, and Attorney Roberto Zacapa, author of several literary works on the Law in Honduras, are recognized and very prestigious jurists in Honduras and their legal interpretations enjoy a great deal of respect.

Principle of Law is that "the effects of the interpretative law are retroactive to the date on which the interpreted law went into effect." In other words, the interpretation of a law does not alter its sense, but simply clarifies the meaning that the interpreted law has always had since the moment it was born[13]. It should be noted that the Interpretative Decree is obligatory because it is a Law.

C) Article 70 (3) of the Law on Fishing

Article 70(3) of Decree No. 139 of May 19, 1959[14] has text that makes it difficult to interpret, even for the Honduran authorities themselves. This provision says verbatim: "Article 70- The following infractions will be penalized with three hundred Lempiras or three hundred days of incarceration: . . . (3) Those who destroy or harvest, the eggs or the offspring of fish, chelonians or other aquatic species for profit."

This Office of the Attorney General of the Republic feels that Article 70(3) only prohibited the destruction or collection of the eggs or offspring of fish, chelonians or other aquatic species but not the destruction or collection of egg-bearing (ovadas) species. Article 70(3) requires that there be direct profit from the eggs, which does not occur with the eggs of the lobsters because they have no commercial value.

CONCLUSION

For the above reasons, with the respect that that Honorable Supreme Court of Justice deserves, we request that it accept as correct the interpretations presented by the State of Honduras, as explained.

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[13] See part II of this statement referring to "The interpretation of the Law in the Honduran legal system, pp. 2, 3 and 4).

[14] Article 70 was replaced with new text that is found in Decree 245-2000. This new Decree does not include the prohibition contained in paragraph 3 of the original Article 70, which, according to our Constitution must be applied retroactively for the benefit of the defendant.

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Each of its pages is initialed and stamped, in the city of:

Tegucigalpa, Capital District Municipality,
December 23, 2003

SERGIO ZAVALA LEIVA
ATTORNEY GENERAL
OF THE REPUBLIC OF HONDURAS

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No. 27870
The undersigned Secretary General of the Secretariat of State in the Office of Foreign Relations, duly authorized CERTIFIES: that the above signature that says SERGIO ZAVALA LEIVA is authentic.

Affixed in his capacity of: ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS

TEGUCIGALPA, CAPITAL DISTRICT
MUNICIPALITY, DECEMBER 24, 2003

JOSE R. LAGOS VALERIANO
IN CHARGE OF AUTHENTICATIONS

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My Commission expires: _____
James M. Reed
Notary Public District of Columbia
My Commission Expires: June 30, 2007

DECLARACIÓN SUPLEMENTARIA DE SERGIO ZAVALA LEIVA, PROCURADOR GENERAL DE LA REPUBLICA DE HONDURAS

Soy el Procurador General de la Republica de Honduras y como tal, su representante legal[1] por virtud del Art. 228 de la Constitución de la Republica. En este carácter comparezco ante esta Honorable Corte Suprema de Justicia, para suplementar la declaración que presenté en este caso a la Corte de Apelaciones de los Estados Unidos del Onceavo Circuito.

Comprendemos que las Cortes de los Estados Unidos han tenido dificultad en determinar la ley de Honduras aplicable a este caso. Nuestro sistema legal se fundamenta en leyes escritas lo que lo diferencia del sistema estadounidense que se basa en decisiones judiciales, de tal manera que ambos sistemas son diferentes entre si.

En el interés de la Justicia, se me hace necesario ahora complementar mi declaración anterior para coadyuvar con esta Honorable Corte a interpretar y aplicar correctamente las leyes de nuestro país.

VI. El Estado de Honduras en ningún momento ha cambiado su posición oficial respecto a sus leyes.

A) La Constitución de la República, como ya lo mencionamos, establece que el Representante Legal del Estado es el Procurador General de la República, y como tal, autorizado para expresar la posición del Estado. En nuestro sistema legal, también existen los denominados "Actos de los órganos de la

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[1] Recibo mi condición de Procurador General de la Republica de Honduras del Decreto No. 3-2002, emitido por el Congreso Nacional el 26 de Enero del 2002. Tengo la autoridad de emitir declaraciones de típos ilustrativas o doctrínales en las cuales el Estado de Honduras de a conocer se posición oficial bajo la Ley de la Procuradoria General de la República.

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Administración" o Actos Administrativos que de acuerdo a la doctrina legal se consideran como aquellos actos jurídicos de la función administrativa que constituyen la voluntad, juicio, conocimiento o deseco del órgano de los emite, y como tales, derivan de ellos efectos jurídicos.

B) La Ley dice que: "[l]os actos de los órganos de la Administración pública adoptarían la forma de Decretos, acuerdos, Resoluciones o Providencias" (Art. 116 de la Ley General de la Administración Pública), y son nulos "a) Los Dictados por órganos absolutamente incompetente, ... [y] c) Los dictados prescindiendo total y absolutamente del procedimiento establecido" (Art.34 de la Ley de Procedimiento Administrativo). En consecuencia, cualquier acto creado violentándose esa normativa legal, no tiene valor ni efecto jurídico[2].

C) El Onceavo Circuito basó su interpretación de las leyes hondureñas en el testimonio de funcionarios que prestaron una colaboración no oficial ni vinculante, a los funcionarios estadounidenses.

D) Honduras ha participado en este caso únicamente a través de su Ministro de Agricultura y Ganadería, mediante Resolución de fecha 15 de Noviembre del 2,001; así como a través de esta Procuraduría General de la República y de la Embajada de Honduras en los Estados Unidos, actuando como *Amicus Curiae* ante el Onceavo Circuito. El Gobierno de Honduras no ha cambiado su posición oficial, sino que se refiere a aspectos estrictamente legales contenidos en este documento.

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[2] Para más detalle ver la Declaración presentada ante el Onceavo Circuito.

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VII. La interpretación de la Ley en el sistema jurídico hondureño.

A) En Honduras, existen tres tipos de interpretación de las leyes:

1. **La interpretación auténtica**: Esta interpretación emana del legislador al explicar el sentido de sus propias leyes.
2. **La interpretación judicial**: Esta interpretación es impuesta por los tribunales de justicia al aplicar las leyes en casos concretos.
3. **La interpretación doctrinal**: Esta interpretación es la que hacen los juristas o jurisconsultos al exponer su opinión personal y recibe su fuerza de la experiencia y sabiduría de sus autores.

B) En nuestro sistema legal, la interpretación judicial es aplicable al caso en que se dicta la sentencia y no tiene efectos generales como precedente judicial ("stare decisis") como ocurre en el sistema jurisprudencial de los Estados Unidos. Por tal razón y como respuesta a la necesidad de que exista una interpretación general de la Ley, nuestra legislación prevé que "solo toca al legislador explicar o interpretar la ley de un modo generalmente obligatorio" (Art. 3 del Código Civil).[3]

C) Cuando el Congreso Nacional interpreta una ley, no la está reformando. La reforma es otra de las atribuciones que tiene el Congreso Nacional. La Constitución de la República establece en su Art. 205 numeral 1 que el Congreso Nacional tiene la atribución de "Crear, decretar, ***interpretar***, ***reformar*** y derogar las leyes" (énfasis agregado). Al utilizar términos diferentes para

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[3] Este precepto no es único de la legislación hondureña, sino que es similar en casi todos los sistemas juridicos civiles basados en el derecho rontano y tiene su origen en el Código de Justianíano que incluye el principio que debe "interpretar la ley quíen la hace."

"interpretar" y "reformar" las leyes, la Asamblea Nacional Constituyente tomo la decisión consciente de diferenciar ambos términos. Por eso, el termino "interpretar" no incluye "reformar" y una interpretación de la ley no es una reforma.

D) En el vernáculo, la palabra "interpretar" quiere decir "Explicar o Declarar el sentido de una cosa, principalmente de textos faltos de claridad" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Edición). El Diccionario de Derecho Usual define la palabra "interpretación" como la "declaración", explicación o aclamación del sentido de una cosa o de un texto incompleto, oscuro o dudosa", y define explícitamente la frase "interpretación auténtica" como "la aclaración que el propio legislador hace de una ley dictada por el" (Diccionario de Derecho Usual, Guillermo Cabanellas, Sexta Edición). La palabra "interpretación" de ninguna manera incluye *el cambio* del sentido de lo interpretado.

E) Si el Congreso nacional, al interpretar una ley esta únicamente explicando el sentido de la misma, lógicamente tal explicación no da lugar a ningún problema de retroactividad, porque la explicación da el sentido que la Ley siempre ha tenido. Consecuentemente tal interpretación requiere que la misma sea incorporada al momento de aplicar la ley interpretada en cualquier caso pendiente.

F) Es importante diferenciar entre una interpretación doctrinal y la interpretación auténtica del legislador. La primera es la opinión de juristas que pueden ilustrar respecto a determinado aspecto de la ley, lo que llamamos "peritos" tal y como han comparecido varias personas para ambas partes lanto particulares como empleados gubernamentales. La interpretación auténtica del legislador es la Ley misma y por lo tanto es incuestionable. Los tribunales de justicia en este ultimo caso no deben discutir si están convencidos con la

interpretación, simplemente deben aceptarla sin discusión[4].

G) En nuestro sistema legal, la interpretación auténtica del legislador tiene efectos similares a los que tiene en los Estados Unidos la interpretación de una ley por la Corte Suprema. Ambos son la máxima autoridad para interpretar las leyes en nuestros países.

H) Si cualquier persona se siente perjudicada por una Ley interpretativa y considera que el Congreso Nacional ha actuado incorrectamente al efectuar dicha interpretación, puede interponer ante la Corte Suprema de Justicia el Recurso de Inconstitucionalidad.

VIII. Resoluciones emitidas por un Ministro son actos administrativos similares a fallos judiciales y tienen efectos jurídicos similares.

A) "La Resolución pondrá fin al procedimiento y en su parte dispositiva se decidirán todas las cuestiones planteadas pro los interesados ..." (Art. 83 de la Ley de Procedimiento Administrativo). La Resolución es el acto mediante el cuál la Administración expresa su posición con respecto a las cuestiones solicitadas por los interesados al iniciar un procedimiento mediante un petición formal. Es por lo tanto el acto mediante en el cual el Estado expresa su voluntad o decisión coa respecto a una situación determinada planteada por una parte interesada.

B) La Resolución del Ministro de Agricultura y Ganadería emitida el 15 de Noviembre del 2001, concluyendo el procedimiento administrativo iniciado por el Comisionado Nacional de los Derechos Humanos, tiene eficacia jurídica de acuerdo con las leyes de Honduras,

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[4] El único caso en que un Tribunal de Justicia puede dejar de incorporar una interpretación legislativa a la ley interpretada es en el cual existe una determinación de inconstitucionalidad declarada por la Corte Suprema de Justicia.

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establece la decisión del Estado con respecto al planteamiento establecido por este Comisionado en su informe y establece la norma de conducta correcta dentro del Ministerio de Agricultura y Ganadería.- De acuerdo al Art. 8 de la Ley General de la Administración Pública, los órganos de la Administración Pública no podrán vulnerar las disposiciones dictadas por un órgano de grado superior, la cual por ende deber ser obedecida por todos los funcionarios de dicho Ministerio.

C) Esta resolución administrativa, a pesar de que es uno acto oficial del Gobierno de Honduras y que equivale a una sentencia judicial, no ha sido aplicada por la Corte de Apelaciones.

D) Es importante destacar la diferencia que existe entre la Resolución del Ministro de Agricultura y Ganadería del 15 de Noviembre del 2001 con la que concluye el procedimiento iniciado por el Comisionado Nacional de los Derechos Humanos, y la Resolución 030-95, que sirve de sustento para la acusación. La Resolución del 15 de Noviembre es el acto mediante el cuál la administración formalmente decide la cuestiones planteadas en una petición después de seguir el procedimiento mandado pro Ley. En cambio, la Resolución 030-95 establece medidas de carácter reglamentario que son atribuidas al Presidente de la República[5]. Los tribunales de la Jurisdicción de lo Contencioso administrativo consideraron la Resolución 030-95 como un Reglamento y declararon su nulidad con base en el Art. 34 de la Ley de Procedimiento Administrativo pro haber sido dictado por un órgano absolutamente incompetente[6] y pro prescindir del procedimiento requerido.

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[5] La excepción ocurre cuando la ley expresamente le atribuye esta facultad de reglamentar a un órgano diference.

[6] La Constitución de la República establece que es el Presidente de la Republica el responsable de emitir las normas de carácter general. Para

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E) Si cualquier persona que se considere afectada, considera que el Ministro de Agricultura y Ganadería ha actuado incorrectamente al emitir su Resolución del 15 de Noviembre, puede acudir a los Tribunales de la Jurisdicción de lo Contencioso Administrativo para demandar que el acto se declare ilegal y sea anulado. Mientras esto no ocurra, este acto de la administración es legitimo y tiene eficacia jurídica.

IX. Cuando existen dudad con respecto a la interpretación de una determinada Ley "se interpretarán los pasajes obscuros o contradictorios del modo que más conforme parezca al espíritu general de la legislación y a la equidad natural" (Art. 20 del Código Civil).

A) En nuestro sistema legal existen principios generales del derecho que comúnmente se conocen y utilizan. Dichos principios, derivados generalmente del derecho romano, por no estar codificados, pueden resultar contradictorios para otro Sistema Legal diferente.

B) Las Leyes se interpretan usando el significado de las palabras utilizadas por el Legislador, el contexto de la ley misma, los principios generales del derecho, la intención del legislador y la equidad natural. No se debe asumir que el legislador emite Leyes que lesionan el interés del país.

C) La ley se puede traducir del español al ingles de maneras diferentes, las cuales pueden sugerir diferentes significados. Por eso es importante que las Cortes estadounidenses no deben dar una interpretación literal a los términos utilizados en las traducciones de materiales legales extranjeros, y que las indicadas Cortes reconozcan que los Gobiernos extranjeros (cuyas leyes las cortes deben interpretar) tienen el criterio experto que permite poner a tales traducciones en el

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mes detalle, ver la lra Declaración de esta Procuradurin General presentada ante la Corte de Apelaciones del Onceavo Circuirte.

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contexto legal extranjero y así darles a las leyes traducidas la interpretación mas acorde a la intención del legislador natural y a la coherencia interna del sistema legal extranjero.

X. Las Leyes y Regulaciones Hondureñas Controvertidas del Caso:

A) Resolución 030-95

La Resolución 030-95, como hemos mencionado anteriormente, fue declarada Nula de Pleno Derecho, *ab initio o ex tunc*, por los Tribunales de lo Contencioso Administrativo por haber sido emitida en violación de las leyes de nuestro país al "haber infringido el ordenamiento jurídico al momento de emitir[a]."

En vista de que las resoluciones impugnadas, incluyendo la Resolución 030-95, eran consideradas firmes, la acción directa de impugnación podía ser interpuesta únicamente sobre la base prevista en el Art. 32 la Ley de la Jurisdicción de lo Contencioso-Administrativo. En tal sentido, cuãndo los Tribunales de lo Contencioso Administrativo declararon la nulidad de esos actos, necesariamente determinaron que las Resoluciones eran Nulas de Pleno Derecho o Nulas Absolutamente aunque surtían efectos antes de haber side declaradas nulas por los tribunales competentes.

Para entender mejor la Nulidad Absoluta de la Resolución 030-95, es importante comprender el significado de la ***Nulidad de Pleno Derecho*** conocida también como ***Nulidad Absoluta.***

La Nulidad de Pleno Derecho, o ***Nulidad Absoluta***, es el grado máximo de invalidez. Los supuestos de Nulidad Absoluta en el derecho administrativo son más restringidos que en derecho común y se limitan a aquellos expresamente

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enumerados en las leyes administrativas.[7] La Nulidad de Pleno Derecho tiene las siguientes características:

1. La acción para hacer valer la infracción es imprescriptible: La Nulidad se puede alegar en cualquier momento, aún y cuando el acto fuese considerado firme. Esto lo reconoce expresamente la Ley de la Jurisdicción de lo Contencioso Administrativo en su Art. 32 al "admitir[] la acción Contendiese-Administrativa contra los actos firmes... cuando fueren nulos de pleno derecho y estén surtiendo efectos."
2. El defecto no puede ser subsanado: Nuestra legislación administrativa establece una diferencia entre los actos nulos y los actos anulables.[8] Los defectos del acto anulable son susceptibles de subsanación ya sea por el simple transcurso del tiempo o por otros medios, mientras los defectos del acto Nula de Pleno Derecho no lo son. Por esta razón es necesaria su declaración de nulidad.
3. La declaración de nulidad goza de eficacia *ex tunc o ab initio*. La declaración de Nulidad Absoluta de un acto priva de efectos al acto desde el momento en que se produjo. Esto tiene su fundamento en el Principio General del

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[7] En la legislación administrativa hondureña, "[s]in perjuicio de lo establecido en leyes especiales," los supuestos de nulidad absoluta se encuentran enumerados en el Art. 34 de la Ley de Procedimiento Administrativo (Decreto No. 152-87 del 28 de Septiembre de 1987), entre los que mencionamos "a) Los dictados por órgano absolutamente incompetente" y "c) Los dictados prescindiendo total y absolutamente del procedimiento establecido."

[8] Articulos 34, 35, 35 y 37 de la Ley de Procedimiento Administrativo entre otros.

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Derecho que requiere que el acto mulo se trate como si nunca se hubiese realizado.[9]

La Nulidad de Pleno Derecho de un acto administrativo no es automática. Una declaración del órgano competente, que en nuestro país son los Tribunales de lo Contencioso Administrativo, es necesaria para darle efecto. Una vez que la nulidad sea declarada, sus consecuencias son las mismas que en el Derecho común.

Habiendo explicado las características de la ***Nulidad de Pleno Derecho o Absoluta***, analizamos la relación de la primera con el Art. 32 de la Ley de Jurisdicción, de lo Contencioso Administrativo.

El Art. 32 establece que "[s]e admitirá la acción . . . contra los actos firmes . . . cuando fueren ***nulos de pleno derecho*** y estén efectos" (énfasis agregado). Debido a que esta declaración de Nulidad de Pleno Derecho es *ab initio o ex tunc*, el Estado se encontraría en plegó de ser demandado por danos resultantes de la aplicación de actos impugnados antes de su declaración de nulidad.

Previendo esta situación, dicho articule disponme que "[s]e admitirá la acción Contencioso-administrativo... ***pero ella únicamente para fines de su anulación e inaplicabilidad futura***" (énfasis agregado), incluyendo esta última para la protección del gobierno.[10] Esta parte final no califica ni altera el efecto *ab initio* de la declaración de nulidad, ni convalida en ningún momento un acto que ha sido declarado ***Nulo de Pleno Derecho*** por la autoridad judicial competente.

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[9] El Código Civil de Honduras establece que debe existir "la debida armonia y correspondencia" entre las leyes (Art. 19), por lo que el articulo 1596 del referido Código fortalece aún más la aplicación de este principio al disponer que "la nulidad absoluta . . . declarada por sentencia Erme, da[] derecho a las partes para ser restituidas al mismo Estado en que se hallaban si no hubiese existido el acto . . . milo."

[10] Si la declaración de Nulidad de Pleno Derecho no fuese *ab initio o ex tunc*, seria compleramente innecesaria la inclusión de esta frase en el Articulo 32 relacionado.

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Como expresé en mi declaración ante el Onceavo Circuito, el propósito de la parte final del articulo en cuestión es "proteg[er] [al Estado] por los danos y prejuicios que pudiese haber ocasionado la aplicación de un acto nulo de pleno derecho."

No cabe duda que conforme a las leyes de Honduras, la Resolución 030-95 fue declararía. Nula de Pleno Derecho, *ab initio o ex tunc*, por los Tribunales de lo Contenciosa-Administrativo. Siendo declarada Nula, La Resolución 030-95 se trata como que nunca existió y no se sigue aplicando en ningún caso pendiente, incluyendo casos criminales como el caso presente.

B) Acuerdo No. 0008-93

El Acuerdo 0008-93, promulgado para implementar la Ley de Industrialización de la Carne (Decreto Ley No. 40), no ha sido legalmente válido desde 1995, cuando fue derogada la Ley en base a la cual el Acuerdo fue emitido.

Histórica y Jurídicamente, un Reglamento deja de tener validez al derogarse la Ley que lo habilitaba. Este principio está basado en los Principios Generales del Derecho aceptados en Honduras.[11]

Además, mediante Decreto No. 198-2001, el congreso Nacional incorporó este principio preexistente al cuerpo legal del Art. 43 del Código Civil, explicando que "la derogación expresa . . . de una ley, deja sin valor ni efectos jurídicos el reglamento . . . emitido para desarrollar la Ley derogada."

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[11] El Principio General del Derecho en este sentido lo resumió el Comisionado Nacional de los Derechos Ilumanos, Dr. Leo Valladares en su Informe Especial como "La antigua máxima de que lo accesorio sigue la suerte de lo principal." Este principio tiene su origen en al precepto del Derecho Romano que dice: "*cuando no subsiste lo principal, no puede subsiste lo accesorio.*" Siendo la "ley" lo principal y el "reglamento" lo accesorio, este el reglamento signe la suerte de la ley, es decir que al derogar la ley, el reglamento también es derogado.

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La Procuraduría General de la República coincide con los grandes juristas hondureños[12] que emitieron declaraciones sobre este particular en este paso al manifestar que es otro Principio General del Derecho que "los efectos de la ley interpretativa se retrotraen a la fecha de la vigencia de la ley interpretada." O sea que, la interpretación de una ley no altera su sentido, pero simplemente aclara el significado que siempre ha tendió la ley interpretada desde el momento de su nacimiento[13]. Nos cabe destacar que el Decreto Interpretativo es obligatorio por ser Ley.

C) Art. 70(3) de la Ley de Pesca

El Art. 70(3) del Decreto No. 139 del 19 de Mayo de 1959[14] presenta una redacción que dificulta su interpretación, aún para las mismas autoridades hondureñas. Esta provisión literalmente dice: "Art. 70- Se castigará con trescientos lempiras o trescientos días de reclusión las siguientes infracciones: . . . (3) El que destruya o recoja con fines de lucro los huevos, crías de los peces, quelonios u otras especies acuáticas."

Esta Procuraduría General de la República considera que el Art. 70(3) solamente prohibía la destrucción o recolección de los huevos o de las crias de los peces, quelonios u otras

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[12] El Abogado José Oswaldo Ramos Soto, Ex Presidente de la Corte Suprema de Justicia y Ex Decano y Profesor de derecho Constitucional de la Facultad de Derecho de la Universidad Nacional Autónoma de Honduras, el Abogado Nicolás Cruz Torres, Ex Magistrado de la Corte Suprema de Justicia, y el Abogado Roberto Zacapa, autor de varias obras literarías sobre el Derecho en Honduras, son reconcídos juristas de mucho prestigio en Honduras y sus interpretaciones legales gozan de gran respeto.

[13] Ver parte II de esta declaración referente a "La interpretación de la Ley en el sistema jurídico hondureño, pp. 2, 3 y 4).

[14] El Artienio 70 fue reemplazado por en nuevo texto que se encuentra en el Decreto 245-2000. Este Nuevo Decreto no incluye la prohibición contenida en el numeral 3 del articulo 70 original, lo que de acuerdo a nuestra Constitución debe ser aplicado retroactivamente para el beneficio del acusado.

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especies acuáticas no así la destrucción o recolección de las especies ovadas.- El Art. 70(3) requiere que exista un lucro directo proveniente de los huevos, el cual no ocurre con los huevos de las langostas porque no tienen ningún valor comercial.

CONCLUSION

Por lo antes expuesto, con el respeto y las consideraciones que esa Honorable Corte Suprema de Justicia se merece, le rogamos acepte como correctas las interpretaciones expuestas por la Procuraduría General de la República de Honduras, conforme queda relacionado.

So pena de perjurio, declaro que la información aquí contenida es verídica y correcta.

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Tegucigalpa, M.D.C. 23 de Diciembre del 2003.

Dr. SERGIO ZAVALA LEIVA
PROCURADOR GENERAL DE LA REPUBLICA
DE HONDURAS.

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Dice: SERGIO ZAVALA LEIVA

Puesta en su carácrer de: PROCURADO GENERAL DE LA REPUBLICA DE HONDURAS

TEGUCIGALPA, M.D.C., 24 DICIEMBRE DE 2003.

JOSE R. LAGOS VALERIANO
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